



IT IS ORDERED as set forth below:

Date: March 12, 2012

A handwritten signature in cursive script, reading "Paul W. Bonapfel", is written over a horizontal line.

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

| | | |
|------------------------------|---|------------------------------|
| IN RE: | : | Chapter 7 |
| | : | |
| ROBERT CLARK GILBERT, | : | Case No. 10-41047-pwb |
| Debtor. | : | |
| _____ | : | |

ORDER DENYING MOTION TO DISMISS

Robert Clark Gilbert (the “Debtor”) filed a voluntary Chapter 11 petition initiating this case on March 15, 2010. On August 30, 2011, the Court denied confirmation of his plan [Docket No. 141] and granted relief from the automatic stay of 11 U.S.C. § 362(a) to First Citizens Bank and Trust Company, Inc. (the “Bank”), which claims to hold a judgment lien on the Debtor’s real property. [142]. After further proceedings, the Court on October 5, 2011, converted the case to Chapter 7, over the objection of the Debtor, who sought its dismissal. [163].

On January 5, 2012, the Debtor filed a motion to dismiss the case [175], to which the Bank [177] and the United States Trustee [182] objected. At a hearing held on February 8, 2012, the Court directed the Debtor to file evidence in support of his contention that he is a farmer such

that the Court could not convert his Chapter 11 case to Chapter 7 under 11 U.S.C. § 1112(c) because he did not request conversion. The Court directed the Debtor to submit such evidence so that the Court could determine whether a dispute of fact existed that would require an evidentiary hearing on the issue.

The Court has considered the record in this case and, specifically, the Debtor's factual and legal contentions as set forth in his Motion to Dismiss [175], his responses to the objections of the Bank and the United States Trustee [181, 182, 185], the 2009 federal tax return the Debtor and his wife filed [186], his submission of evidence in response to the Court's direction at the hearing [190], his supplemental response [194], and an amendment to the 2009 federal tax return. [195].

This Order constitutes the Court's findings of fact and conclusions of law with regard to the Debtor's motion to dismiss pursuant to Fed. R. Civ. P. 52(a), *applicable under* Fed. R. Bankr. P. 9014 and 7052. The findings of fact are based on the undisputed evidence before the Court in accordance with the Court's directions at the hearing on February 8, 2012.

The Court may dismiss a Chapter 7 case under 11 U.S.C. § 707(a) for cause.¹ The Debtor's motion and related documents assert two reasons that he contends constitute cause for dismissal.

One ground for dismissal relates to the claim of the Bank. At the February 8 hearing, the Court ruled that this ground did not provide cause for dismissing the case. The Court incorporates that ruling into this Order. For purposes of clarity and completeness, the Court will

¹The Court may also dismiss a case for "abuse" under 11 U.S.C. § 707(b) upon request of the United States Trustee or a party in interest. Section 707(b) provides no basis for dismissal at the instance of the Debtor in this case and has not been invoked.

summarize and supplement the reasons for its ruling.

The Debtor renews the argument that he made at the confirmation hearings in this case that the Bank does not have standing to assert a claim against him because it did not validly acquire the claim from the creditor that obtained a judgment against him, Georgian Bank. The Debtor now adds to his previous arguments a contention that an assignment of the judgment executed by an officer of the Bank pursuant to a power of attorney granted by the Federal Deposit Insurance Corporation, as receiver for the Georgian Bank, is invalid and fraudulent because the power of attorney had expired.²

The Court declined to address the merits of the Debtor's earlier arguments about the Bank's ownership of the claim in connection with the proceedings on confirmation of his plan because, among other things, it was not disputed that a judgment was entered against him; the Bank had shown a colorable basis for its claim to hold the claim arising from the judgment;³ and the FDIC had not taken any action in this case to assert any interest in the claim. None of the foregoing has changed since the Court's earlier ruling.

As announced at the February 8, hearing, the Court declines to revisit this issue.⁴ The

²See Motion to Dismiss, ¶11, and pages 12 and 13.

³At the hearings on confirmation, the Bank presented evidence to support its contention that it had acquired the claim from the Federal Deposit Insurance Corporation, as receiver for the Georgian Bank. That evidence established that the Bank holds at least a colorable claim.

⁴The Court notes that the assignment bears a date of September 30, 2011, and that the power of attorney expired on that date. See Motion to Dismiss [175] at pages 12 and 13. The assignment reflects that it was not recorded until October 17, 2011, but recordation is not critical to the validity of the assignment as between the parties. The Court might speculate that Mr. Gilbert might be able to produce evidence that the document was back-dated, but it clearly provides the basis for the Bank's assertion of at least a colorable claim that it owns the claim.

reasons are as follows. For present purposes, it is the Court's responsibility to determine whether the conversion of the case should stand, and whether cause to dismiss it exists, based on the undisputed facts that someone holds a substantial judgment against the Debtor, that the Debtor voluntarily initiated this bankruptcy case, that it was pending for a significant amount of time during which the judgment creditor was not able to exercise its state law remedies while the Court afforded the Debtor an opportunity to seek confirmation of a plan, and that the only entity to claim an interest in the judgment in this case (the Bank) has concluded that administration of this case under Chapter 7 is in the interest of the holder of the judgment.⁵ The Court continues to leave for another day the question of whether the Bank or some other entity is the holder of the claim entitled to any distributions in this case when that issue is directly presented.

The Debtor's other contention, as noted above, is that he is a farmer and that the Court cannot convert a farmer's Chapter 11 case to Chapter 7 without the farmer's request under 11 U.S.C. § 1112(c). Obviously, the Debtor must be a farmer to claim the protection of this provision.

11 U.S.C. § 101(20) defines "farmer" as a person that received more than 80 percent of his gross income during the taxable year immediately preceding the filing of the petition from "a farming operation owned or operated by such person." Because the Debtor filed this case in 2010, the applicable tax year for purposes of this definition is 2009.

The 2009 tax return filed by the Debtor and his wife, as amended [186, 195], shows

⁵As noted in earlier text, the Court lifted the automatic stay of 11 U.S.C. § 362(a) to permit the Bank to exercise its state law remedies. [142]. At the hearing on conversion to Chapter 7, the Bank announced that it favored conversion of the case to Chapter 7 and that it understood that administration under Chapter 7 would require that the estate receive some proceeds from the disposition of its collateral.

\$30,993 in gross farm income, of which the Debtor claims \$12,397.⁶ The Debtor has also submitted evidence that he was responsible for the day to day farming operations that occurred on the land that the Debtor owns.⁷

The problem for the Debtor is that § 101(20) requires that the farming operation be owned or operated *by* the person claiming to be a farmer. The Debtor neither owned nor operated the farming operation. Instead, the farming operation was owned and operated by Gilbert Farms, Inc., a corporation in which the Debtor holds 40 percent of the shares and his wife owns 60 percent of the shares. The Debtor's submission of evidence in connection with his motion to dismiss confirms what the record in this case otherwise shows:⁸ the gross income the Debtor claims to have received from farming came from Gilbert Farms, Inc.⁹ Gilbert Farms,

⁶See *infra* note 9.

⁷Debtor's Response to United States Trustee's Objection [185] at ¶ 22 and page 6.

⁸The Debtor in his Motion to Dismiss notes that his original disclosure statement describes the history of the "Debtor's family 'Cut Flower Farm' from 1996 until the present." [175 at ¶ 10]. The excerpt from the disclosure statement attached to his motion states, "The Cut Flower Farm became Gilbert Farms, Inc. Mr. Gilbert continued to sell and develop real estate as his other employment." [175 at 7].

The Debtor in his Motion to dismiss also refers to his Statement of Financial Affairs as describing "the farm as the sole source of income for the Debtor until the Debtor was forced to take on a second job in October of 2009." [175 at ¶ 10]. In his Statement of Financial Affairs filed on March 29, 2010 [9], the Debtor responded to Question 1 by stating that his 2009 income came from "Russell Ventures" (the "other employment") and "Gilbert Farms, Inc." [9 at 24].

The record thus clearly establishes that Mr. Gilbert received income (effectively characterized as income from employment) from Gilbert Farms, Inc., and that Gilbert Farms, Inc., received income from a farm operation that it owned and operated on his property. Thus, Mr. Gilbert personally received income from Gilbert Farms, Inc., not from his personal ownership or personal operation of a farm operation.

⁹The Debtor states in the third paragraph of his "Submission of Further Evidence" [190] that "Debtor's gross income from Gilbert Farms in 2009 was \$12,397 (40% x \$30,993, total Gilbert Farms gross income)." Attached to the submission is a K-1 from Gilbert Farms, Inc.

Inc., conducted its farming operation on the Debtor's property, but ownership of farm land does not make the property owner the owner or operator of the farm operation.

Because Gilbert Farms, Inc., owned and operated the farming operation – although not the land itself – Gilbert Farms, Inc., not the debtor, was the “farmer” within the definition of 11 U.S.C. § 101(20). Put another way, the Debtor received income from Gilbert Farms, Inc., not from the ownership or operation of a farm. Thus, the Debtor was not a “farmer” within the definition of 11 U.S.C. § 101(20). Consequently, the conversion of this case to Chapter 7 did not violate 11 U.S.C. § 1112(c), and the Debtor has not established cause for its dismissal.

In view of this conclusion, the Court need not determine whether the Debtor's failure to assert that he was a farmer at the time his case was converted to Chapter 7 resulted in a waiver of his right to relief from the conversion order.

[190 at 5], and a statement from the Debtor's accountant that the Debtor owned 40% of Gilbert Farms, Inc., a “Sub-S Corporation.” [190 at 4]. It is clear and indisputable that the Debtor's reference to “Gilbert Farms” in the quoted statement is to Gilbert Farms, Inc., and that it is a Subchapter S corporation for tax purposes, meaning that Gilbert Farms, Inc., is a conduit or “pass-through” entity for tax purposes such that its income and expenses, generally, pass through to the owners of its shares. This accounts for the showing of gross income from farming on Mr. and Mrs. Gilbert's 2009 tax return, as amended, for tax purposes, but it does not mean that they personally received the income for any other purpose. As a matter of law, Gilbert Farms, Inc., not the Debtor or his wife, received the income from the farming operation that Gilbert Farms, Inc. owned and operated. Anything they received must be a distribution in some form from Gilbert Farms, Inc.

Based on, and in accordance with, the foregoing and with the Court's findings of fact and conclusions of law stated at the hearing on February 8, 2012, it is hereby **ORDERED and ADJUDGED** that the Debtor's Motion to Dismiss be, and the same hereby is, **DENIED**.

THIS ORDER WAS NOT PREPARED FOR PUBLICATION AND IS NOT INTENDED FOR PUBLICATION.

[END OF ORDER]

DISTRIBUTION LIST

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